

De obligatione principis protegendi subditos... Some Remarks on recursus ad principem

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*DE OBLIGATIONE PRINCIPIS
PROTEGENDI SUBDITOS...*
SOME REMARKS ON *RECURSUS AD PRINCIPEM*

I. INTRODUCTION

The relationship between Church and State has been the subject of many studies¹. From these studies it appears that this relationship can be characterized as ambiguous. On the one side, the Church and her social activities were useful to the State. On the other side, the Church as a public body was also a competitor for the State. From the Middle Ages onwards, the State tried progressively to 'control' the Church in these two aspects: on the one hand, the State tried to convince the Church to regulate her activities according to the views of the State; on the other hand, the State tried to impose itself as the only public body. This paper focuses on the legal instruments by which the State tried to control the Church in these two aspects.

The *ius placiti* must be mentioned first in this respect. As a result of this right, ecclesiastical legislation could not be promulgated in a particular territory without the consent of the sovereign. In the Low Countries we find several statutes putting forward this *ius placiti*, for example an Ordinance which dates from approximately 1530². From this Ordinance it also appears that the *ius placiti* had been the subject of earlier legislation, for it mentions that:

feu de tres digne memoire l'Empereur Maximilien ... en lan 1484, et le roy de Castille Don Philippe ... en lan 1497, eussent faict certains edictz et placcaerts, par lesquels ils auroient expressement et de leur certaine science interdict, prohibe et deffendu a tous ... de mectre a execution esdicts pays de par deca aucunes bulles, reservations, expectatives, lettres executoriales, ne autres collations, ne provisions apostoliques, sur paine de perdre leffect et fruit des dites bulles et impetrations, et den estre puniz a lexemple dautres, tant par bannissement de nos dits pays de par deca que destre declaire a iamais inhabille de pouvoir ioyir ou posseder daucuns benefices ne fruitz diceux esdicts pays, iusques a ce que les dictes bulles, provisions et autres impetrations auroient este veuz en conseil de par deca, et sur ce este decrete lettres de consentement et de placet en forme deue.

1 E.g. J.-F. LEMARIGNIER, J. GAUDEMET & G. MOLLAT, *Institutions ecclésiastiques* (Histoire des Institutions françaises au Moyen Age, 3), Paris, 1962; I.A. DIEPENHORST, *De verhouding tusschen Kerk en Staat in Nederland*, Utrecht, s.a. [1946]; B. TIERNEY, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law, 1150-1625* (Emory University Studies in Law and Religion, 5), Atlanta, 1997.

2 J. LAMEERE (ed.), *Recueil des ordonnances des Pays-Bas. Deuxième série – 1506-1700*, vol. III: *Contenant les ordonnances de 8 janvier 1529 (1530, N.ST.) au 11 décembre 1536*, Bruxelles, 1902, pp. 72-77.

I shall not focus here on the *ius placiti*. My attention will be directed to instruments curbing the power of the Church which can be brought under the heading of *recursus ad principem*, i.e. a complaint to the secular authorities. It seems natural to speak about this subject at a conference devoted to Zeger-Bernard Van Espen, since *recursus* was an important object of study for him. Both his *Motivum iuris pro Van de Nesse* published in 1707 and the *Tractatus de recursu ad principem*, published at the end of Van Espen's life in 1725, deal with this subject³. The latter study was very influential, for example in Bavaria, where it was taken as the starting-point for legislation on this subject in 1779⁴.

II. RECURSUS AD PRINCIPEM

Various authors have written on Van Espen's ideas on *recursus*⁵. We find a useful summary of the *Tractatus* in Eichmann's *Der recursus ab abusu nach deutschem Recht*, a volume published in Breslau in 1903⁶. Eichmann is, however, unclear in his terminology. He does not explain that *recursus ab abusu*, which appears in the title of his book, is not a synonym for *recursus ad principem*, the subject of Van Espen's *Tractatus*. Occasionally one gets the impression that this author views both types of *recursus* as equivalents⁷. Nevertheless, a distinction should be made because *recursus ad principem* is the general expression for all means of recourse to secular authorities in ecclesiastical affairs, whereas *recursus ab abusu* is only a particular type of *recursus ad principem*. In addition, Eichmann does not explain that he uses the terminology *recursus ab abusu* as the equivalent of *appellatio (tamquam) ab abusu* or *appel comme d'abus*, a method of filing a complaint with a secular court about ecclesiastical affairs developed in late medieval France (see infra)⁸. In Van Espen's *Tractatus*, this *appel comme d'abus* is designated a *remedium cassationis*. Another method of filing a complaint with the secular authorities, i.e. another type of *recursus ad principem*, was a possessory action known in the Low Countries as (ecclesiastical) *maintenue*. As will appear later, its French equivalent was termed (an ecclesiastical) *complainte*.

3 See also Z.B. VAN ESPEN, *Jus Ecclesiasticum Universum*, Lovanii, 1700. Cf. J. HALLEBEEK, *Recursus ad Principem. Zegers Bernard Van Espen on the rôle of secular courts in preventing the abuse of ecclesiastical jurisdiction*, in J. HALLEBEEK & B. WIRIX (eds.), *Met het oog op morgen. Ecclesiologische beschouwingen aangeboden aan Jan Visser*, Zoetermeer, 1996, pp. 64-71, esp. 65.

4 E. EICHMANN, *Der recursus ab abusu nach deutschem Recht mit besonderer Berücksichtigung des bayerischen, preußischen und reichsländischen Kirchenrechts, historisch-dogmatisch dargestellt* (Untersuchungen zur Deutschen Staats- und Rechtsgeschichte begründet von Otto von Gierke im Jahre 1878, 66), Breslau, 1903 [= Aalen, 1971], p. 121 ss. On the influence of Van Espen in general, see G. LECLERC, *Zeger-Bernard Van Espen (1646-1728) et l'autorité ecclésiastique. Contribution à l'histoire des théories gallicanes et du jansénisme* (Studia et Textus Historiae Juris Canonici, 2), Zürich, 1964, p. 355 ss.

5 M. NUTTINCK, *La vie et l'œuvre de Zeger-Bernard Van Espen. Un canoniste janséniste, gallican et régalien à l'université de Louvain (1646-1728)* (Université de Louvain. Recueil de travaux d'histoire et de philologie, IVe série, 43), Louvain, 1969, p. 483 ss.; LECLERC, *Van Espen et l'autorité ecclésiastique* (n. 4), p. 315 ss.; HALLEBEEK, *Recursus ad Principem* (n. 3), p. 64 ss.; M.A.H.P. VAN STIPHOUT, *Van de paus of van de koning? Zeger-Bernard Van Espen en het appel comme d'abus*, in *Pro Memoria. Bijdragen tot de rechtsgeschiedenis der Nederlanden* 1 (1999) 100-114, p. 100 ss.

6 EICHMANN, *Der recursus ab abusu* (n. 4), p. 127 ss.

7 E.g. EICHMANN, *Der recursus ab abusu* (n. 4), pp. 120-121. The same is done by P.G. CARON, *L'appello per abuso* (Raccolta di studi della rivista *Il diritto ecclesiastico*, 3), Milano, 1954, p. 4: '[...] tale istituto, che assumeva, a seconda dei paesi e delle epoche, diverse denominazioni (es.: *recursus ad principem*; *appellatio ab abusu*: «*appel comme d'abus*» in Francia; «*recurso de fuerza*» in Spagna [...])'.

8 The use of these terms as equivalent appears only implicitly, for example EICHMANN, *Der recursus ab abusu* (n. 4), pp. 100-101.

1. *Appel comme d'abus*

The *appel comme d'abus* was a specific type of appeal, which did not take a case to a higher court (*appellatio ab inferiore ad superiorem*), but from an ecclesiastical court to a secular court. Most authors agree that the expression *appel comme d'abus* first appeared in France in the 15th century. According to Eduard Eichmann⁹, this occurred in the second half of the century. Jan Hallebeek and, following him, Maurice van Stiphout¹⁰ mention the year 1448. But even at this period we do not find the expression used in statutes. Article 69 of the *Ordonnance sur l'administration de la justice*, dated Paris July 1493, for example, refers to 'appellations extraordinaires', where in my opinion *appel comme d'abus* is meant¹¹.

Eichmann states that although a specific designation may have been lacking before the 15th century, the theory and practice of *appellatio ab abusu* are much older; in his opinion traces of *appel comme d'abus* can be found in the 13th and 14th centuries¹². In support of this view Eichmann refers to early measures of the secular authorities taken against excommunications which, according to these authorities, had been pronounced unjustly. Eichmann also mentions orders of the royal court directed to ecclesiastical courts to stop taking cognizance of a particular matter¹³.

One of the first French statutes containing references to *appel comme d'abus* is the Ordinance of Villers-Cotterêts (1539)¹⁴. From the way the references are phrased, it appears that the designation *appel comme d'abus* was readily understood by contemporaries. Article 5 contains the rule that *appel comme d'abus* does not suspend the procedure before the ecclesiastical court 'ès-matières de discipline et correction ou autres pures personnelles, et non dépendentes de réalité'; the following Articles fix some fines in relation to this means of recourse. We also find rules on the *appel comme d'abus* in the Ordinance of Blois (1579)¹⁵, for example in Articles 59 and 60. The *appellatio tamquam ab abusu* is not mentioned in the important French *Ordonnance civile pour la réformation de la justice* (1667)¹⁶. This means of recourse was however a subject of discussion when the draft Ordinance was examined, shortly before its introduction, in order to see whether changes were necessary. References to the *appel comme d'abus* were made in relation to Article XXV.2. This Article deals with a court's refusal to pass judgment in cases subject to appeal which have reached the stage of judgment. It was a matter of debate whether this Article concerned ecclesiastical judges as well as the secular courts. According to one opinion this was indeed the case, and it was held that under such circumstances *appel comme d'abus* could be lodged, whereas according to another opinion it was doubtful whether indeed this Article applied to the ecclesiastical judge as well. After the last opinion it was not clear whether a refusal to pass judgment could be viewed as *abus* giving rise to *appel comme d'abus*. In the end the Article was introduced without major changes.

9 EICHMANN, *Der recursus ab abusu* (n. 4), p. 52.

10 HALLEBEEK, *Recursus ad Principem* (n. 3), p. 66 n. 9; VAN STIPHOUT, *Van de paus of van de koning?* (n. 5), p. 105

11 The text of this ordinance can be found in F. ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises, depuis l'an 420 jusqu'à la Révolution de 1789*, vol. XI: 1483-1514, Paris, 1827, p. 214 ss.

12 EICHMANN, *Der recursus ab abusu* (n. 4), p. 50.

13 EICHMANN, *Der recursus ab abusu* (n. 4), p. 42 ss.

14 The text of this ordinance can be found in ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 11), vol. XII: 1514-1546, Paris, s.a., p. 600 ss.

15 The text of this ordinance can be found in ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 11), vol. XIV: 1555-1589, Paris, s.a., p. 380 ss.

16 The text of this ordinance can be found in ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 11), vol. XVIII, 1661-1671, Paris, s.a., p. 103 ss.

It seems that it was the intention of the French legislature to have the *appel comme d'abus* dealt with in a separate ordinance¹⁷ which, however, was never introduced. Legislation on the equivalent of *appel comme d'abus* in the Low Countries (*cassation*) is also unknown to me.

The *appel comme d'abus* was used (a) where the ecclesiastical authorities exceeded their jurisdiction, appropriating to themselves the powers of the secular authorities (such *abus* was known as 'usurpation de pouvoir', 'attentat' or 'enterprise') and (b) when ecclesiastical authorities abused their jurisdiction (such *abus* was termed 'excès de pouvoir' or 'violence')¹⁸. Theoretically, the appeal could also be lodged where secular authorities arrogated to themselves powers which belonged to the Church¹⁹, but whether this ever occurred in practice is doubtful²⁰. The latter rule had most likely been introduced in order to appease the Church so as not to give it the impression that the *appellatio ab abusu* was a unilateral measure aimed only at the jurisdiction of the Church²¹.

According to the writings of Van Espen, *appellatio ab abusu* could be lodged against papal rescripts which clashed with the canons or concordats or anything else which a bishop or an ecclesiastical judge might have ordered to nullify secular jurisdiction, royal legislation, the prerogatives of the national Church or the privileges of the States²². This coincides with the teachings of the so-called *Libertés de l'Eglise gallicane* (1594) by Pierre Pithou²³, where the cases in which the *appel* was allowed are described as follows (see Article 79):

quand il y a enterprise de iurisdiction ou attentat contre les saints decrets et canons receus en ce royaume [de France], droits, franchises, libertez et privilèges de l'Eglise gallicane, concordats, edicts et ordonnances du Roy, arrests de son Parlement; bref, contre ce qui est non seulement de droit commun divin ou naturel, mais aussi des prerogatives de ce Royaume, et de l'Eglise d'iceluy.

It is evident that this enumeration is not very detailed. The specific cases in which *appel comme d'abus* was allowed were never fixed²⁴. In the *Procès-verbal des conférences tenues par ordre du roi, pour l'examen des articles de l'ordonnance civile du mois d'avril 1667*²⁵ (the important Ordinance on civil procedure promulgated under the reign of Louis XIV mentioned above) some remarks on this subject are made²⁶. It is said that nothing was more contrary to the laws of the kingdom of France than limiting the *appellations comme d'abus* to specific cases. It is also stated that in the past clerics had often asked for a specific enumeration of those cases in which *appel comme d'abus* could be lodged.

17 *Procès-verbal des conférences tenues par ordre du roi, pour l'examen des articles de l'ordonnance civile du mois d'avril 1667* [...], Paris, 1776.

18 EICHMANN, *Der recursus ab abusu* (n. 4), p. 58.

19 P. PITHOU, *Libertés de l'Eglise gallicane*, in ID., *Preuves des libertez de l'Eglise gallicane*, Paris, 1651, P. I, Art. 80.

20 EICHMANN, *Der recursus ab abusu* (n. 4), p. 57.

21 *Ibid.*

22 HALLEBEEK, *Recursus ad Principem* (n. 3), p. 68. See also LECLERC, *Van Espen et l'autorité ecclésiastique* (n. 4), p. 245.

23 This collection of *Libertés*, drafted on private initiative, was soon considered to have official status in France. See CARON, *L'appello per abuso* (n. 7), p. 70 n. 206: '[q]uesta raccolta, formulata con carattere privato, acquistò tosto autorità ufficiale, venendo quindi ad assumere, nel diritto ecclesiastico francese, una posizione analoga a quella del *Decretum Gratiani* nel *Corpus Juris Canonici*'.

24 EICHMANN, *Der recursus ab abusu* (n. 4), p. 59.

25 *Procès-verbal des conférences tenues par ordre du roi* (n. 17).

26 *Procès-verbal des conférences tenues par ordre du roi* (n. 17), p. 360 ss. See the remarks concerning Article XXV.

However, each time they had received the reply that such cases could not be defined in any way other than by saying that they should be cases against the freedoms of the Gallican Church, the holy canons received in France, against the laws of the kingdom and the authority of the king. Furthermore, it is stated that the courts were to consider each particular case on its merits.

When a case was brought before the secular court by way of *appel comme d'abus* this resulted in a stay of execution of the ecclesiastical proceedings. As mentioned earlier, the Ordinance of Villers-Cotterêts (1539) limited this stay of execution to cases which did not concern ‘matières de discipline et correction ou autres pures personnelles, et non dépendantes de réalité’²⁷.

A successful *appellatio tamquam ab abusu* did not lead to a judgment replacing the earlier decision of the ecclesiastical authorities, but only to the ecclesiastical decision being quashed. In practice, however, this rule was ignored: the French secular courts often supplied the plaintiff with a new decision²⁸.

Although the French secular authorities tried to limit the use of *appel comme d'abus*²⁹, we find this appeal occurring so often in French practice that it must have severely reduced the powers of the Church. Eichmann even designates the *appel comme d'abus* as ‘das Mittel, um die kirchliche Jurisdiktion, Gesetzgebung und Rechtsprechung [...] lahm zu legen’³⁰. It resulted in many ecclesiastical cases, even those falling under the exclusive jurisdiction of the Church, being brought before secular courts. This was especially alarming for the Church when the courts did not limit themselves to quashing the ecclesiastical decision, but also furnished the applicant with a new judgment.

2. Possessory Remedies

Possessory actions before the secular courts concerning ecclesiastical matters, especially those dealing with benefices (*maintenue* in the Low Countries and *complainte* in France; in the Low Countries *complainte* was applied only in secular matters), are occasionally viewed as a particular type of *appel comme d'abus*. In a recent article, Van Stiphout maintains to this point of view³¹. According to Michel Nuttinck *maintenue* and *cassation* (i.e. *appel comme d'abus*) do not constitute two remedies which can be adequately distinguished from one another. Nuttinck states that they share many features and that he has not found with Van Espen the basis for an adequate distinction between the two remedies. *Maintenue* presupposes a *cassation*; and the *cassation* is usually accompanied by *maintenue*, claims Nuttinck³². Nevertheless, in my opinion these remedies should be distinguished sharply, at least from a theoretical perspective.

It should be remembered that in cases of *appel comme d'abus* we find ecclesiastical matters being brought before the secular judge³³. This is different where possessory remedies are concerned. From the perspective of many medieval and early-modern authors, possessory actions, even those concerning ecclesiastical property, were a secular

27 The text of this ordinance can be found in ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 14), p. 600 ss.

28 EICHMANN, *Der recursus ab abusu* (n. 4), p. 64.

29 R. NAZ, *Appel comme d'abus*, in DDC 1 (1935) 818-827.

30 EICHMANN, *Der recursus ab abusu* (n. 4), p. 55.

31 VAN STIPHOUT, *Van de paus of van de koning?* (n. 5), pp. 100-101.

32 NUTTINCK, *La vie et l'œuvre de Van Espen* (n. 5), p. 491 n. 457.

33 CARON, *L'appello per abuso* (n. 7), p. 86, states that the application of the *appel comme d'abus* ‘si risolveva in uno sconfinamento totale da parte della magistratura regia nel campo proprio dell'autorità ecclesiastica’.

affair. According to Robert-Joseph Pothier, for example, it may well be that benefices are an ecclesiastical matter. Nevertheless, the conservation of the possession of the owner of the benefice belongs to the ‘police extérieure’, ‘l’ordre public’ and the ‘puissance séculière’. This ‘puissance’ was established by God himself, says Pothier, for the conservation of public order in all the constituent parts of the State, of which the Church is a part³⁴. Evidently at this point Pothier strictly adheres to the teachings of the Gallican Church. In order to support his opinion he quotes Charles Dumoulin, who stated that: ‘[...] all possessory actions and related matters have a temporal character and belong to the jurisdiction of the secular court, not to that of the ecclesiastical court. In cases concerning benefices, possession is dealt with before the secular judge, because in a possessory matter attention is not devoted to a spiritual matter in a spiritual way’ (‘[...] omne possessorium et omnis causa possessoria temporalis est et secularis, non ecclesiastici fori. In beneficialibus et spiritualibus causis, possessorium coram iudice seculari tractatur; quia, quum agitur de possessorio, de re spirituali non spiritualiter agitur’)³⁵. Similar views were expressed by other authors. M.A. Rodier, for example, in his *Questions sur l’Ordonnance de Louis XIV, du mois d’avril 1667* holds that possession is a purely factual matter and completely temporal; consequently cognizance of possessory actions belongs in his opinion to secular judges, and all the more because they alone to the exclusion of ecclesiastical judges, have the ‘puissance c[o]ercitive’, that is to say, the right to suppress the factual disturbance of possession (‘de contenir et de réprimer les voies de fait’)³⁶. This author, like many others, refers to a bull granted to the French king by Pope Martin V. Hallebeek³⁷ states that here the bull *Apostolicae Sedis*, promulgated on May 1st, 1429, is meant. This bull is mentioned in one of the *decisiones* of Guy de la Pape³⁸. In it, Pope Martin assures King Charles VII, that he certainly had no intention of derogating from the rights and jurisdiction of the King of France. This bull was interpreted in such a manner that the secular courts were entitled to continue to take cognizance of possessory actions regarding benefices.

In short, possessory actions were considered to be a secular affair because they touched upon public order³⁹. In my opinion, therefore, bringing a possessory case before a secular court was different from lodging an *appel comme d’abus*, since theoretically possessory matters did not belong to the jurisdiction of the ecclesiastical courts, as was the case with many issues which were brought before the secular judge by way of *appel comme d’abus*. However, this view was not always shared by the Church, as is apparent from many instances, for example from an Ordinance originating in the Low Countries dated June 10th, 1534. In this Ordinance we find that it had come to the knowledge of Emperor Charles V that some litigants brought actions against inhabitants of the Low Countries before the court in Rome in order to challenge judgments in possessory matters passed by the Emperor’s judges. All of these cases concerned dignities and benefices situated in the Low Countries. The papal judges delegate took cognizance of them without being willing to stop the proceedings, something they would have done if they had considered possessory actions concerning benefices to be a secular matter⁴⁰.

34 R.-J. POTHIER, *Traité de la procédure civile*, ed. M. DUPIN AINÉ, *Œuvres de R.-J. Pothier, contenant les traités du droit français*, Bruxelles, 1832, vol. VI, p. 62[II. III. 5. 2].

35 Charles Dumoulin as quoted by POTHIER, *Traité de la procédure civile* (n. 34), p. 62 [II. III. 5. 2].

36 M.A. RODIER, *Questions sur l’ordonnance de Louis XIV, du mois d’avril 1667*, Toulouse, 1777, p. 246.

37 J. HALLEBEEK, *The possessory remedy of maintenance. Origin and application by the Court of Utrecht*, in B.C.M. JACOBS & E.C. COPPENS (eds.), *Een Rijk Gerecht. Opstellen aangeboden aan prof. mr. P.G. Nève* (RRGNI. 41), Nijmegen, 1998, pp. 193-214, esp. 201-202.

38 Cf. HALLEBEEK, *The possessory remedy of maintenance* (n. 37), p. 202.

39 HALLEBEEK, *The possessory remedy of maintenance* (n. 37), p. 197.

40 LAMEERE (ed.), *Recueil des ordonnances des Pays-Bas* (n. 2), pp. 446-447.

Although possessory remedies and *appel comme d'abus* must be sharply distinguished from a theoretical perspective, it cannot be denied that they are closely related: they may coincide in a number of cases. According to Eichmann, for example, abuse of ecclesiastical power was present (at least in France) where ‘bei Besetzung der Beneficien die staatlichen Vorschriften nicht beachtet worden waren’⁴¹. In this case, the decision concerning the filling of the vacant benefice could be quashed by way of *appel comme d'abus*. At the same time one can envisage a possessory action being brought by the person who was entitled to the benefice against the person who had been wrongly provided with it.

As stated above, in the Low Countries the possessory action to be brought before the secular court in ecclesiastical affairs was known as (ecclesiastical) *maintenue*. As Hallebeek noted, it has been a matter of debate among modern authors (including myself) as to whether or not the action of *maintenue* as applied in the Low Countries was of indigenous origin. In my Ph.D. thesis⁴² I noted that Philips Wielant in his 16th century *Practijke civile*⁴³ (a Flemish treatise on civil procedure) contradicts himself when he claims both that *maintenue* originated in France (I.XII.4) and that in France only two possessory remedies (*complainte* and *simple saisine*), excluding *maintenue*, existed (I.VI.5). Because I did not find the action of *maintenue* mentioned in studies on the French royal courts, I concluded that Wielant was wrong when he referred the origin of this action to France. Hallebeek did not agree with my point of view in his article *The possessory remedy of maintenue*⁴⁴. In this article, the learned author concludes that the origin of *maintenue* most likely does lie in France. However, he states that a technical name for it did not exist. Hallebeek also claims that in France *complainte* was never used for possessory protection of prebends (benefices). This latter view can, however, be shown to be incorrect. The applicability of *complainte* in cases concerning benefices is, for example, clear from Article 61 of the Ordinance of Villers-Cotterêts (1539), which reads: ‘Qu'il ne sera reçu aucune complainte après l'an, tant en matières prophanes que bénéficiales, le défendeur mesme n'ayant titre apparent sur sa possession’⁴⁵. It seems likely, however, that Hallebeek is correct when he states that *maintenue* originated in France. In my opinion, the action known as (ecclesiastical) *maintenue* in the Low Countries was considered to be a particular type of *complainte* in France. This is shown by the similarities between these two types of action.

One of the main similarities between (ecclesiastical) *maintenue* and (ecclesiastical) *complainte* is the plaintiff's obligation to submit his title to the benefice concerned⁴⁶. The submission of a title was not required when the secular equivalents of these actions were brought. According to Jean Domat⁴⁷ this resulted from the fact that, unlike ownable secular property, which could be possessed by everyone and which could be acquired in many ways, benefices could only be possessed by persons who had the required capacity and who had been furnished with the benefice in the manner prescribed by ecclesiastical law.

41 EICHMANN, *Der recursus ab abusu* (n. 4), p. 61.

42 C.H. VAN RHEE, *Litigation and Legislation. Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)* (Studia, 66), Brussels, 1997, p. 227.

43 F. WIELANT, *Practijcke civile*, [Thantwerpen, 1573], ed. E.I. STRUBBE (Fontes Iuris, Batavi Rariores, 3), Amsterdam, 1968.

44 HALLEBEEK, *The possessory remedy of maintenue* (n. 37), p. 197 ss.

45 The text of this ordinance can be found in ISAMERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 14), p. 600 ss.

46 ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 16), p. 103 ss.: *Ordonnance civile touchant la réformation de la justice* (1667), Art. 2. The same rule appears implicitly in the *Ordonnances de Montils-les-Tours* (1453), to be found in ISAMERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 11), vol. IX: 1438-1462, p. 202 ss.

47 J. DOMAT, *Les loix civiles dans leur ordre naturel*, Paris, 1777, III. 7.1.15 note u.

A second similarity concerns the period of time during which the benefice needed to have been in the possession of the person who brought the possessory action. In the Low Countries *complainte* could only be brought where possession for a year and a day of the object or right concerned could be proven. In cases of *maintenue*, on the contrary, it sufficed to show a title (canon institution) and actual possession⁴⁸. In France, such a distinction was also made, even though in both cases the action to be brought was called *complainte*. This appears, for example, where Pothier states: 'Elle [la complainte en matière bénéficiaire] diffère des complaints en matière profane [...] en ce qu'au lieu que la possession d'an et jour destituée de titre suffit pour celle-ci, au contraire, la complainte en matière bénéficiaire n'est accordée qu'au bénéficiaire qui possède en vertu d'un titre'⁴⁹. Apparently, for ecclesiastical *complainte* possession for a year and a day was not required.

All of this makes it very likely that the action known as (ecclesiastical) *maintenue* in the Low Countries was equivalent to ecclesiastical *complainte* in France. Hence, Hallebeek may have been right when he located the origin of *maintenue* in France. It seems likely however, that the habit of using the name *maintenue* to designate the action called ecclesiastical *complainte* in France originated in the Low Countries. This may well have been the result of the fact that in the definition of *complainte* the word *maintenue* played a crucial role. To give but one example: Rodier in his *Questions sur l'Ordonnance de Louis XIV, du mois d'avril 1667* defines cases concerning ecclesiastical *complainte* as follows: 'Ce sont les instances ou procès ou il s'agit de la maintenue en la possession d'un benefice'⁵⁰.

Before concluding this part of my paper, it should be emphasized that by the time of Van Espen an important difference between (ecclesiastical) *maintenue* in the Low Countries and (ecclesiastical) *complainte* in France had come into existence. This shows that the French secular authorities had gone further than those in the Low Countries in curbing the power of the Church. This difference concerned the right to bring a petitory action (an action to claim ownership) after or during possessory litigation.

The situation in the Low Countries was that petitory litigation was indeed possible. Petitory actions concerning benefices did not, however, belong to the jurisdiction of the secular courts. They had to be brought before the ecclesiastical judge. The latter was not allowed to hear a petitory action before the possessory action had resulted in a final judgment, and until this judgment had been complied with or had been enforced⁵¹.

By the start of the 17th century, the situation in France, although originally similar to that in the Low Countries⁵², had changed completely. There the jurisdiction of the ecclesiastical judge was curbed in that it was decided that after possessory judgments concerning benefices had been pronounced no petitory actions were to be allowed⁵³. If, nevertheless, such petitory actions were brought, this could give rise to *appel comme d'abus*⁵⁴. The reason for this situation was that in ecclesiastical actions concerning possession the judgment was the result of an inspection of titles. It was argued that on the basis of such inspection the question as to who was entitled to the benefice was decided beyond doubt.

48 WIELANT, *Practycke civile* (n. 43), I. XIII. 3-4.

49 POTHIER, *Traité de la procédure civile* (n. 34), p. 62 [II. III. 5. 1].

50 RODIER, *Questions sur l'ordonnance de Louis XIV* (n. 36), p. 245.

51 VAN RHEE, *Litigation and Legislation* (n. 42), p. 258.

52 *Ordonnance de Villers-Cotterêts* (1539), Art. 49, to be found in ISAMBERT et al. (eds.), *Recueil général des anciennes lois françaises* (n. 14), p. 600 ss.

53 D. Jousse, *Nouveau commentaire sur l'ordonnance civile du mois d'avril 1667*, Paris, 1767, p. 215 [Art. XV. 7].

54 *Ibid.*

III. CONCLUSION

In the present paper I have focussed on legal instruments used during the *Ancien Régime* for limiting and controlling the power of the Church. Although some of these instruments, notably the *appel comme d'abus*, survived the French Revolution for some time, they have by now become an historical phenomenon. Nevertheless, their application in the past remains important from an historical perspective, in that it shows us that law is not a neutral, technical phenomenon. Van Espen is a good example of a lawyer who realised that law may be applied to further political ideas. He served his own 'Jansenist' cause by applying the legal instruments available at his time. In order to understand Zeger-Bernard Van Espen's ideas in detail, some legal background information is needed. I hope to have provided this information in this contribution.

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